NO. 43476-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DOUGLAS S. JONES,

Appellant,

v.

THE STATE OF WASHINGTON AND THE DEPARTMENT OF CORRECTIONS,

Respondents.

RESPONDENTS' BRIEF

ROBERT M. MCKENNA
Attorney General

GLEN A. ANDERSON
Assistant Attorney General
WSBA #17490
Attorney General's Office
Torts Division
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401-2317
253-593-5243

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF ISSUES 4

III. STATEMENT OF FACTS 5

IV. LAW & ARGUMENT 12

A. Argument In Support Of Issues Decided By The Trial Court 12

1. The Running Of The Statute Of Limitations Is Governed By Federal Law 12

2. The Trial Court Correctly Applied Federal Law In Concluding That The Statute Of Limitations Applied In This Case 13

B. Argument In Response To Issues Raised By Appellant Which Weren't Raised In The Trial Court 23

1. Mr. Jones Is Precluded From Raising His Duty To Advise Argument For The First Time On Appeal 24

2. Tolling Of The Statute Of Limitations Is Governed By Federal Law 25

3. Mr. Jones's "Affirmative Duty" Argument Has Already Been Rejected In *Huseman* 26

4. There Exists No Duty To Advise Employees Of Their Legal Remedies Under State Law 28

5. Mr. Jones's Case Is Not Like The *Abbott* Case 32

V. CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Abbott v. State,
979 P.2d 994 (Alaska 1999) ..... passim

Brown v. State,
816 P.2d 1368 (Alaska 1991) 18, 19

Burnett v. Tacoma City Light,
124 Wn. App. 550, 104 P.3d 677 (2004) 28, 29

Cowiche Canyon Conservatory v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992) 30

Douchette v. Bethel School Dist. No. 403,
117 Wn.2d 805, 818 P.2d 1362 (1991) 16, 17

Folsom v. Burger King,
135 Wn.2d 658, 958 P.2d 201 (1988) 29

Huseman v. Icicle Seafoods, Inc.,
471 F.3d 1116 (9th Cir. 2006) ..... passim

Maziar v. State of Washington,
151 Wn. App. 850, 216 P.2d 430 (2009) 31

Reclamation Dist. v. Spider Staging,
107 Wn. App. 468, 27 P.3d 645 (2001) 24

Robinson v. City of Seattle,
119 Wn.2d 34, 830 P.2d 318 (1992) 13

Seattle First Nat'l Bank v. Shoreline Concrete Co.,
91 Wn.2d 230, 588 P.2d 1308 (1978) 24

Youngblood v. Schireman,
53 Wn. App. 95, 765 P.2d 1312 (1988) 30

Statutes

46 U.S.C. § 30104, the Jones Act
(previously 46 U.S.C. § 688) 1, 33

Federal Employer's Liability Act (FELA),
45 U.S.C. § 51 et seq. (1908) 18

RCW 51.28 ..... 4, 5, 7, 29

Rules

RAP 10.3 30

RAP 9.12 ..... 4, 23, 24

I. INTRODUCTION

Appellant, Douglas Jones, a Correctional Sergeant at McNeil Island Corrections Center (MICC), alleges he was injured on April 20, 2002 while riding the ferry operated by the Department of Corrections (DOC) which transports employees between the mainland and McNeil Island. CP at 2. Mr. Jones reported his injury to his supervisor the next day and, in accordance with Washington State law, his supervisor provided him with an Labor & Industries (L&I) Accident Report form for him to complete. CP at 26-28. Jones completed the accident report resulting in his receiving a permanent disability pension from L&I. CP at 41-46.

Appellant then filed a Jones Act[1] suit against DOC almost nine years later on March 17, 2011. CP at 15-21. In his complaint, Jones admitted the three year statute of limitations had expired. CP at 20. However, he went on to assert that the State should be estopped from asserting the statute of limitations because the State affirmatively misled him by telling him that his only available remedy was pursuant to the Workers Compensation scheme when he asked about possible maritime benefits. CP at 20.

[1] 46 U.S.C. § 30104, the Jones Act (previously 46 U.S.C. § 688).

Contrary to the allegations of his complaint, Jones admitted in his deposition that nobody had told him his sole remedy was pursuant to the Worker's Compensation law. CP at 30-33. Further, Jones also admitted he never asked anybody that worked for the State whether maritime remedies were available to him. CP at 30-33. As a result, the State moved for summary judgment on the basis of the statute of limitations. CP at 1-8.

Subsequent to the State filing its motion, Jones's counsel noted the deposition of several State employees. One of these employees, John Little, testified that at Safety Meetings employees were informed that it was DOC's policy, in accordance with state law, that an L&I Accident Report form was to be filed anytime there was an on-the-job injury. CP at 134-36. Contrary to Jones's repeated assertions, there is no evidence in the record to support the proposition that the State had a policy to mislead employees or hide the fact that additional remedies, including maritime remedies, might be available to an injured employee. The only "policy" was to ensure that injured employees completed the statutorily required L&I Accident Report form.

In response to the State's motion, Jones argued that he was misled into believing his sole remedy was pursuant to the Worker's Compensation scheme based on what was allegedly said at the Safety

Meetings – despite the fact there is no evidence he was present at any of the Safety Meetings identified by Mr. Little. CP at 49-72. Jones contended that the State should be estopped from asserting the statute of limitations based on the fact that it told employees about the availability of Worker's Compensation without affirmatively discussing what, if any, additional remedies may be available to an injured employee. CP at 49-72.

The trial court, applying well-established federal law, rejected Jones's argument and granted the State's motion. In particular, the Court followed a Ninth Circuit opinion, *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116 (9th Cir. 2006), which is directly on point, in which the court held that an employer's act of filing a Worker's Compensation claim on the behalf of an injured maritime worker, without telling the worker that maritime remedies may be available, did not toll the statute of limitations or estop the employer from relying on the statute of limitations.

On appeal, it appears Jones is abandoning his reliance on an estoppel or tolling argument and, instead, is advancing an argument that the State had an affirmative duty to tell him about his potential maritime remedies based on either the volunteer rescue doctrine or a common law "special relationship" he claims exists between an employer and employee. Jones's attempt to argue this new legal theory is without merit

for several reasons. First, Jones did not raise these arguments in the trial court and, therefore, is precluded from doing so on appeal by RAP 9.12. Second, it erroneously attempts to inject state law into deciding an issue that must be decided solely by reference to federal law. Third, a similar argument was specifically rejected in the *Huseman* case. Finally, the evidence does not support application of either the volunteer rescue doctrine or any type of recognized special relationship.

The trial court's order granting summary judgment was correct and should be affirmed on appeal.

II. RESTATEMENT OF ISSUES

A. Whether the trial court correctly determined, applying federal law, that neither equitable estoppel or equitable tolling applied to toll the statute of limitations based on the State's providing Jones with an L&I Accident Report form as required by Title 51.28 RCW?

B. Whether Jones may rely on state law to delay the running of the statute of limitations on a claim governed exclusively by federal law?

C. Whether the State is a volunteer when it acts pursuant to a mandatory statutory duty?

D. Whether an employer has a special relationship with its employees which gives rise to a duty to provide legal advice to the employee as to what legal remedies are available to the employee against the employer?

III. STATEMENT OF FACTS

Appellant, Douglas Jones, was a Correctional Sergeant at MICC in April 2002. CP at 49. Jones alleges that he was injured when the ferry which transports Department of Corrections employees between Steilacoom and McNeil Island made a hard landing at the Steilacoom dock. CP at 49-50. The ferry is operated by the DOC. CP at 17.

Jones alleges that he went to the emergency room on the morning of April 20, 2002. CP at 26-28. When he returned to work that evening he reported his injury and emergency room visit to his supervisor, Lieutenant David Flynn. CP at 26-28. In accordance with state law, RCW 51.28.010 and 51.28.025, Lieutenant Flynn provided Jones with an L&I Accident Report form. CP at 26-28. It is undisputed that, other than providing Jones with the required L&I form, Lt. Flynn did not provide any other guidance or direction to Jones. CP at 26-28. Jones filled out and submitted the form, as required by law, which resulted in his injuries being

covered by L&I and his eventually receiving a disability pension from L&I. CP at 41-46.

Jones then did nothing in terms of pursuing any other remedies for almost 9 years. Apparently, sometime in 2011, Jones's neighbor told him he should go see his current attorney, Mr. Dickman, which Jones did. CP at 38-39. That resulted in the present lawsuit being filed on March 17, 2011. CP at 38-39.

In the complaint filed by Mr. Dickman, Jones specifically alleged that, "[t]he statute of limitations has ran in this case." CP at 20. However, Jones goes on to allege:

> However, plaintiff was misled by an agent of defendant that he was only entitled to Worker's Compensation remedies. When asked about possible maritime benefits, both the Department of Corrections and the Department of Labor & Industries misled Mr. Jones and told Mr. Jones his sole remedy was under Worker's Compensation scheme.

CP at 20. Based on this alleged affirmative misrepresentation, Jones asserted that the State should be estopped from asserting the statute of limitations as a defense. CP at 20.

Jones's deposition was taken on April 4, 2012. CP at 23. During his deposition, Jones admitted he was not told by anybody either at DOC or L&I that his sole remedy was under the Worker's Compensation scheme. CP at 30-33. Jones also admitted that he never asked anybody at

DOC or L&I about maritime remedies or the possibility of a lawsuit. CP at 30-33.

Based on Jones's deposition testimony, the State filed a summary judgment motion seeking dismissal based on the statute of limitations. CP at 1-8. Subsequent to the State filing the motion, Jones's counsel noted the depositions of several State employees including John Little, a DOC employee. There is no evidence that Jones ever spoke to Mr. Little about his injuries or the possibility of suing DOC as a result of his injuries.

John Little was the supervisor of the Marine Department for MICC in 2002. CP at 88. During his deposition, he testified that it was the State's policy to have injured workers fill out an L&I Accident Report form and that this requirement was discussed at safety meetings where worker's compensation was discussed. CP at 134-36. That this would be the State's policy is not surprising since all employers are required to report employee injuries to the Department of Labor and Industries on forms prescribed by L&I. RCW 51.28.025. Failure to do so may result in the imposition of civil penalties. *Id.* That is exactly what occurred in this case.

Contrary to Mr. Jones's assertion, there was no state policy to hide or mislead employees as to the availability of other remedies. In claiming that such a policy exists, Jones's counsel misrepresents the testimony of

Mr. Little. On page 9 of Jones's brief, Jones selectively cites the deposition testimony of Mr. Little as follows:

> Q. Now, if you were a passenger, would it also be true at that time that you expect the DOC employee to fill out an L&I claim rather than any kind of maritime claim?
>
> A. Well, if – I mean they can – that would be up to them if they wanted to do that, but this right here was policy. They had to fill out the accident report for the worker's compensation claim for L&I rather than just go seek compensation under the Jones Act or anything. This was a state policy.
> . . . .

Jones's representation of Mr. Little's testimony is misleading at best due to his omission of the remainder of Mr. Little's testimony as indicated by the ellipses. The entire answer is as follows:

> Q. Now, if you were a passenger, would it also be true at that time that you would expect the DOC employee to fill out an L&I claim rather than any kind of maritime claim?
>
> A. Well, if – I mean they can – that would be up to them if they wanted to do that, but this right here, this was policy. They had to fill out the accident report for the workers' compensation claim for L&I rather than just go seek compensation under the Jones Act or anything. This was a state policy.
>
> If they wanted to do the Jones Act or if they wanted to get an attorney and just file a lawsuit not stating to the Jones Act, that would be entirely up to them. Because over the years - - I mean, there was many lawsuits that were filed on different - - for different reasons and stuff onboard the boat, claiming

> accidents, and there were things like that that wasn't Jones Act, it was just a lawsuit. I mean, people are - - they have every right to do that, but we didn't go down all the legal remedies if somebody got hurt.

CP at 134-35.

Similarly, Jones edits out the portion of Mr. Little's testimony where he explains why the availability of claims other than Worker's Compensation were not discussed at safety meetings. Jones cites the following testimony of Mr. Little, which continues immediately after the deposition testimony just cited:

> Q. Right.
>
> A. It was just this was – especially if they were an employee, and this was policy, they were to fill out the workmen's compensation claim.
>
> Q. Which they got ---
>
> A. Which was the accident report.
>
> Q. Right. And again, no one at the Department would also tell them that they had the possibility of any other kind of claims; is that true?
>
> A. We wouldn't – we wouldn't tell them. We wouldn't volunteer that information, no.
>
> . . . .
>
> Q. What about general maritime claims for a passenger, did anyone discuss that at these safety meetings.
>
> A. No.

Appellant's Opening Brief (Appellant's Br.) at 10 (emphasis added in Appellant's Brief).

Once again, Jones omits testimony which places Mr. Little's entire testimony in context. The omitted portion of the testimony is an entire question and answer, appearing where Jones has placed the ellipses, which places context to Mr. Little's testimony:

> Q. Right. And again, no one at the Department would also tell them that they had the possibility of any other kind of claim; is that true?
>
> A. We wouldn't – we wouldn't tell them. We wouldn't volunteer that information, no.
>
> Q. And even when you had these meetings, these safety meetings, it wouldn't be brought up, that although you had an L&I claim, you could also have another kind of claim, a maritime claim; is that true?
>
> A. We didn't -- we didn't -- not to the safety meetings they didn't, because the safety officer, who was a person that gives all of the classes and everything on workmen's comp, they wasn't familiar with the Jones Act, and even the captains and myself and the other supervisors, we wasn't that familiar with the Jones Act because we never had to have anything to do with it.
>
> Q. What about general maritime claims for a passenger, did anybody discuss that at these safety meetings?
>
> A. No.

CP at 135-36.

There was no "policy" not to tell employees what legal remedies might be available to them in addition to Worker's Compensation. Rather, the policy was to inform employees that if they were injured on the job site state law required them to file an L&I Accident Report form. CP at 134. Additional remedies were not discussed at the safety meetings because, quite frankly, that was not the purpose of the safety meetings and, as indicated, the safety officer was not a lawyer and was not qualified to discuss what other remedies may or may not be available. CP at 136. More importantly, there is no evidence before the court to indicate Jones was present at any of these safety meetings or was misled in any way by anything said at such a meeting.

In responding to the State's summary judgment motion, Jones argued that the statute of limitations should be tolled because he was misled by the "state's" policy of funneling all claims into the Worker's Compensation system without telling employees what other remedies may be available to them. CP at 49-72. The trial court, relying on federal case law which is directly on point, rejected Jones's argument and granted the State's motion. Significantly, Jones did not argue that the State had an affirmative duty under state law to advise him as to what remedies were available to him as he is now arguing. Rather, Jones argued that under the applicable federal authorities the State should be estopped from relying on

the statute of limitations due to its alleged "policy" of misinforming employees of their legal rights. CP at 49-72.

IV. LAW & ARGUMENT

A. Argument In Support Of Issues Decided By The Trial Court

1. The Running Of The Statute Of Limitations Is Governed By Federal Law

Jones's attempt to rely on state law as a basis for excusing his failure to file his suit in a timely manner is without merit. Jones's claim is brought pursuant to federal maritime law and as his complaint accurately states, "application of Washington State law is preempted by the application of federal maritime law." CP at 145. This is true with respect to the statute of limitations as indicated by the court's holding in *Abbott v. State*, 979 P.2d 994 (Alaska 1999), a case in which appellant Jones's counsel represented the aggrieved party. In *Abbott*, when addressing appellant's counsel's argument that the statute of limitations should be tolled in that case, the court held as follows:

> As a threshold matter, we note that federal law, not state law, governs the tolling issue. By enacting federal statutes of limitations to govern maritime claims, Congress manifested a desire to achieve uniformity in the treatment of maritime claims. To allow the diverse laws of each state to determine when the limitation period on a federal cause of action is tolled, interrupted, or suspended would tend to defeat the congressional policy of uniformity. Therefore, we apply federal law here.

Abbott, 979 P. 2d at 997.[2]

Appellant has not, and cannot, cite to any authority to suggest that this court is not bound by federal precedent with respect to the issue of tolling. The only federal case cited to either this court, or the trial court, is *Huseman*, 471 F.3d 1116. Interestingly, on appeal, Jones never cites the majority holding in *Huseman*, nor does he make any attempt to distinguish it from the present case. The reason is obvious, he can't.

2. The Trial Court Correctly Applied Federal Law In Concluding That The Statute Of Limitations Applied In This Case

Mr. Jones's argument in the trial court was simple and straightforward. Mr. Jones contended that, because the State provided him with an L&I Accident Report form without telling him that he could also sue the State under federal maritime law, the State should be estopped from asserting the statute of limitations as a defense. Unfortunately for Mr. Jones, federal law does not support that proposition as the trial court concluded. In fact, as already indicated, the Ninth Circuit rejected the exact argument Mr. Jones is making in the only federal case on point that

[2] The Washington Supreme Court has similarly held that federal law controls the question of when a cause of action accrues for purposes of the statute of limitations on a federal cause of action. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992) (federal law controls the question of when a cause of action accrues when we discuss the statute of limitations for § 1983 purposes).

has been cited to either this court or the trial court. That case is *Huseman*, 471 F.3d 1116.

In *Huseman*, the plaintiff was injured while working on a vessel owned by his employer. Just as in the present case, the employer submitted a Worker's Compensation accident report on behalf of the plaintiff as required by state law. *Huseman*, 471 F.3d at 1119. Just as in the present case, nobody in *Huseman* told the plaintiff that his remedy was limited to workers' compensation. *Id.* at 1120-21. Just as in the present case, the plaintiff in *Huseman* never inquired as to whether he had rights outside the Workers' Compensation system. *Id.* Just as in the present case, the plaintiff in *Huseman* was never told by anybody that he could or could not pursue claims under federal maritime law. *Id.* Finally, just as Mr. Jones, the plaintiff in *Huseman* never did anything to inquire about the availability or extent of federal maritime remedies until after the statute of limitations expired. *Id.*

Just as Mr. Jones in the present case, the plaintiff in *Huseman* argued that because his employer processed his Workers' Compensation claim, he assumed his employer would take care of everything, including his federal maritime claim. *Huseman*, 471 F.3d at 1123. Based on that, plaintiff in *Huseman* asserted he should be allowed to proceed under theories of equitable tolling or equitable estoppel. *Id.* at 1118.

In rejecting plaintiff's argument in *Huseman*, the Ninth Circuit noted that plaintiff failed to demonstrate the due diligence necessary to invoke equitable tolling because he never inquired about the availability or extent of federal remedies until after the statute of limitations ran. *Huseman*, 471 F.3d at 1116. There is no distinction between the plaintiff in *Huseman* and Mr. Jones as it relates to the issue of equitable tolling because it is undisputed that Mr. Jones never inquired about the availability of federal maritime remedies. Therefore, the holding in *Huseman* precludes plaintiff in the present case from relying on equitable tolling to toll the statute of limitations.

The Court's rejection of plaintiff's equitable estoppel claim in *Huseman* is also instructive. Just as Mr. Jones, the plaintiff in *Huseman* argued he was misled by the fact that his employer filed a Worker's Compensation claim on his behalf without disclosing the availability of federal maritime remedies. In rejecting this as a basis for applying equitable estoppel, the court analyzed the issue and held as follows:

> Huseman just "assumed" that Icicle would take care of everything for him, including his now untimely federal Jones Act and unseaworthiness claims, because Icicle was helping with his Alaska Workers' Compensation benefits.
>
> The question is whether that assumption was reasonable. By law, Icicle was required to file a claim for Huseman for the Alaska benefits. By doing so, did Icicle fraudulently conceal Huseman's federal options? Could Icicle's assistance in processing the Alaska Worker's Compensation benefits reasonably be viewed as likely to mislead an employee into

> believing that Icicle voluntarily shouldered a duty to disclose, file, or process any federal claims arising out of an injury, such as a statutory cause of action under the Jones Act or a tort claim under the unseaworthiness doctrine?
>
> ***1124** Huseman's assumption is insufficient to support an equitable estoppel claim. There is a wide gap between fraudulent concealment and even pernicious lulling into a false sense of security, and what occurred here. We agree with the district court's succinct summation: "[Huseman] was not misled by anything defendants said, did not say, or did. He was simply unaware that seamen enjoy special protections under the law and his employer was under no obligation to advise him on that point."

Huseman, 471 F.3d at 1123-24.

The Court's holding with respect to the equitable estoppel issue is dispositive of Mr. Jones's implied, but unspoken, argument that the statute of limitations should be tolled because he did not know he had a legal cause of action. As the court makes clear, the fact that a plaintiff may not know they have a legal cause of action is not a sufficient basis upon which to invoke estoppel or otherwise delay the running of the statute of limitations. That holding is consistent with Washington law which holds that the discovery rule, which tolls the statute of limitations, does not require knowledge of the existence of a legal cause of action. *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813-14, 818 P.2d 1362 (1991).[3] Thus, to the extent

[3] In *Douchette*, plaintiff alleged that although she knew she had been treated differently due to her age, she did not know she could sue based on age discrimination. The court refused to apply the discovery rule to toll the statute of limitations because the discovery rule does not require knowledge of the existence of a legal cause of action

Jones is contending that the statute of limitations should be tolled because he didn't know he could sue under federal maritime law, his argument has no support in either federal or state case law.

Jones's attempt to distinguish *Huseman* from the present case is without merit and, in fact, is misleading. Jones contends *Huseman* is distinguishable because the employer in *Huseman* provided the plaintiff in *Huseman* with a handout at the time he was hired informing him that he had federal maritime remedies if he was injured on the job and that the employer would coordinate those benefits. While it is true that the employer in *Huseman* did provide such a handout, that fact played no role in the court's decision. In fact, the plaintiff in *Huseman* argued that the existence of the handout was the reason estoppel should apply because it lulled him into believing that his employer had taken on the duty to secure him available federal benefits. *Huseman*, 471 F.3d at 1122. The court rejected this argument because the evidence showed the plaintiff did not remember the handout or anything about it and therefore could not have relied on it. *Id.*

Given that the plaintiff in *Huseman* did not remember anything about the handout, he was in no different position with respect to knowledge of available federal remedies than the plaintiff in the present case. In any event, the presence of the handout providing notice of the availability of federal

---

itself, but merely knowledge of the facts necessary to establish the elements of the claim. *Douchette*, 177 Wn. App. at 813-14. That same analysis applies to the present case.

remedies in *Huseman* is of no relevance to the present case because the court placed no weight on it in reaching their decision.

The only other case cited by Jones addressing the question of when the statute of limitations in a federal maritime action is tolled based on estoppel is *Abbott v. State*, 979 P.2d 994 (Alaska 1999). *Abbott* involved a claim brought by an employee against the Alaska Marine Highway System (AMHS) as a result of her being burned while working as a cook on a ferry. *Abbott,* 979 P.2d at 995. At the time of her injury, the Collective Bargaining Agreement between the AMHS and plaintiff's bargaining unit specifically provided:

> [I]n lieu of Wages, Maintenance and Cure, remedies for unseaworthiness and other seaman's remedies, including Jones Act remedies, employees shall be entitled to Alaska Worker's Compensation Benefits.

Abbott, 979 P.2d at 995.

In August 1991, more than three years after the plaintiff's injury, the Alaska Supreme Court found that a similar provision in another Collective Bargaining Agreement was unenforceable because it violated the Federal Employer's Liability Act (FELA)[4] and federal case law. *Abbott,* 979 P.2d at 995, citing *Brown v. State*, 816 P.2d 1368 (Alaska 1991). Five months after the *Brown* decision, the AMHS claims adjuster sent plaintiff Abbott a form

[4] Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq. (1908).

letter informing her of the *Brown* decision, that she was no longer covered by Worker's Compensation and instead should avail herself of the traditional maritime remedies if she was injured while working aboard a vessel in navigable waters. *Id.* at 996.

Plaintiff Abbott filed suit seeking maritime remedies one year after receiving the letter, which was nearly five years after her injury. *Abbott*, 979 P.2d at 997. The State moved for summary judgment based on the statute of limitations and the trial court granted the motion. *Id.* On appeal, the Alaska Supreme Court, applying federal law, reversed the trial court's order.

Preliminarily, the *Abbott* court did not apply equitable estoppel, which requires a showing of misconduct by the defendant such as fraud, misrepresentation or concealment. *Abbott,* 979 P.2d at 998. Rather, the court applied the federal doctrine of equitable tolling finding that the plaintiff could not have, in the exercise of reasonable diligence, discovered essential information bearing on her claim. *Id.* In particular, the court found the plaintiff in *Abbott* reasonably relied on the Collective Bargaining Agreement provision that Worker's Compensation benefits were provided in lieu of traditional maritime remedies and the State informing her that her only remedy was under the Worker's Compensation system. *Id.* Thus, it was the plaintiff's reliance on an express provision in a Collective Bargaining

Agreement that told her she had no ability to claim maritime remedies that justified tolling the statute of limitations in *Abbott*.

No such facts are present in this case. There is no Collective Bargaining Agreement or other document which informed plaintiff that he could not pursue maritime remedies. Nor did anyone from the state inform him that his only remedy was pursuant to the Worker's Compensation system. The only thing the State did in this case was provide the plaintiff with an L&I form.

Mr. Jones's description of the *Abbott* case in his opening brief is at best, suspect. Mr. Jones asserts:

> The *Abbott* Court held that Ms. Abbott had been misinformed about her remedies and that the misinformation tolled the statute of limitations. Ms. Abbott had relied upon what was in her collective bargaining agreement until the claims adjuster for the State of Alaska let Ms. Abbott know that she might have a maritime remedy up until then undisclosed to Ms. Abbott.

Appellant's Br. at 23.

Contrary to Mr. Jones's representation, Ms. Abbott was not merely "misinformed" about her remedies nor was the maritime remedy "undisclosed." Her Collective Bargaining Agreement specifically told her that her only remedy was pursuant to the Worker's Compensation scheme and that she could not pursue any federal maritime remedies. *Abbott*, 979 P.2d at 995. There is a huge difference between telling someone that they

cannot bring a federal maritime claim, as was the case in *Abbott*, and simply remaining silent as to the availability of such remedies as is the case here. That fundamental difference is why appellant's contention that, "[t]here is little difference between a notation in a collective bargaining agreement and a formal policy by an employer that is enforced through safety meetings as in Mr. Jones' case" has no merit. The difference is in *Abbott* the plaintiff was relying on an affirmative representation, whereas here, Mr. Jones is relying on at best an assumption because there was no representation either way as to the availability of federal maritime remedies – a distinction the court in *Huseman* found dispositive and which is dispositive here.

It is interesting that Mr. Jones makes no attempt whatsoever to distinguish the facts in *Huseman* from the present case, or even mention the holding of the majority. Rather, he attempts to distinguish *Huseman* from *Abbott* and, in doing so, relies entirely on the dissent in *Huseman*. His effort at obfuscation is clever, but not persuasive.

Mr. Jones claims what distinguishes the *Abbott* case from *Huseman* is that, "in *Huseman* the plaintiff claimed he did not remember seeing a notice in his employment contract which said if injured he would be paid workers' compensation and his employer would coordinate his federal maritime benefits." Appellant's Br. at 24-25. What Mr. Jones fails to point out to the court is that the plaintiff in *Huseman* was arguing that the

employer should be estopped from asserting the statute of limitations based on his being provided a handout when he was hired which told him that he was entitled to federal maritime remedies and that the employer would coordinate those benefits. The plaintiff was arguing estoppel should apply because he relied on an affirmative representation from his employer. In that respect, his argument was identical to that of the plaintiffs in *Abbott*, to wit, that he was claiming his reliance on an affirmative representation of his employer was the reason he did not timely file his federal maritime action.

Contrary to Mr. Jones's depiction, the plaintiff did not "claim" he didn't remember seeing the notice as some type of sword. He was arguing he relied on the notice and the defendant argued he could not allege reliance on the notice, because he did not remember seeing it. Based on those facts, the court found the notice could not form the basis of an estoppel because if the plaintiff did not remember seeing the handout he could not have relied on it. *Huseman*, 471 F.3d at 1132. Thus, rather than being a factor that distinguishes *Huseman* from *Abbott*, the fact that the plaintiff in *Huseman* did not remember the notice highlights the salient point – there must be an affirmative representation from the employer that the employee relies on in order for the statute of limitations to be tolled. As the undisputed evidence in this case establishes that there was no such representation, tolling does not apply and the order granting summary judgment should be affirmed.

B. Argument In Response To Issues Raised By Appellant Which Weren't Raised In The Trial Court

Mr. Jones argued in the trial court that the statute of limitations should be tolled because he had allegedly been misinformed as to the remedies available to him because the State did not tell him about federal maritime remedies. As already indicated, the *Huseman* court specifically rejected that argument. Now, on appeal, appellant is raising an entirely new argument which is that the State, as an employer, has an affirmative duty to advise employees as to all the legal remedies available to the employee anytime the employee is injured. There are several reasons that this court should reject appellant's new argument.

First, Jones did not raise this argument before the trial court and is, therefore, precluded from raising the argument on appeal by RAP 9.12. Second, it erroneously attempts to inject state law into an issue that is governed solely by federal law. Third, a similar, broader duty to provide legal advice based on seamen being "wards of the court" was specifically rejected in *Huseman*. Finally, the cases cited by Mr. Jones do not support imposing a duty on employers to provide legal advice to employees.

///

///

1. Mr. Jones Is Precluded From Raising His Duty To Advise Argument For The First Time On Appeal

Mr. Jones argues for the first time on appeal that the State had an affirmative duty to advise him as to all legal remedies available to him based on either the volunteer rescue doctrine or the special relationship he alleges exists between an employer and an employee. It is a well established rule that an argument that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); *Reclamation Dist. v. Spider Staging*, 107 Wn. App. 468, 476, 27 P.3d 645 (2001) (precluding plaintiff from raising new argument on appeal as to when statute of limitations began to run); RAP 9.12.

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12.

Mr. Jones did not argue in the trial court that the State had any affirmative common law duty to advise him of his potential legal remedies under either the volunteer rescue doctrine or a special relationship. This failure to do so precludes him from raising the argument for the first time on appeal.

2. Tolling Of The Statute Of Limitations Is Governed By Federal Law

Mr. Jones argues in his brief that the State has a common law duty to explain his remedies to him should he be injured on-the-job. While none of the cases cited by Mr. Jones support this proposition, there is a more fundamental problem with his analysis of the law. All of the cases cited by Mr. Jones in support of this supposed duty are state law cases. However, as already indicated, federal law, not state law, governs the tolling issue. *Abbott*, 979 P.2d at 997. Thus, even if the state law cases cited by Mr. Jones could be read as creating a duty on the part of employers to act as lawyers for their injured employees, which they cannot, they have no applicability in the present case. As Mr. Jones has not, and cannot, cite any federal authority imposing a duty on employers to advise employees of their legal rights anytime they are injured on the job, his argument is without support and should be rejected.

3. Mr. Jones's "Affirmative Duty" Argument Has Already Been Rejected In *Huseman*

Mr. Jones's counsel, Eric Dickman, was also plaintiff's counsel in the *Huseman* case. In *Huseman*, as he does here, Mr. Dickman attempted to bolster his estoppel and tolling arguments by arguing that maritime employers have a fiduciary duty to affirmatively disclose and explain federal causes of action. *Huseman*, 471 F.3d at 1118. However, rather than rely on state law as a basis for the creation of such a duty, counsel argued for the creation of such a duty under the "wards of the court" doctrine applicable to seamen. *Id.*. In rejecting counsel's invitation, the Ninth Circuit stated:

> Given the circumstances of this case, Huseman cannot establish the requirements for either equitable tolling or equitable estoppel. Huseman asks us to fashion, under the "wards of the court" doctrine for seamen, a broad fiduciary duty that would require employers, like Icicle, to affirmatively disclose and explain federal causes of action, including Jones Act and unseaworthiness claims, to their employees. We are mindful of the special remedies and protections reserved for seamen because of the perils of the sea and the hard conditions of their labor; we decline however, to embrace such an unprecedented extension of the "wards of the court" doctrine. Although ship owners owe a duty "to act in good faith and to deal fairly in performing and enforcing . . . contract[s]," *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 913 (9th Cir. 2003), these duties do not extend so far as to render ship owners legal advisors to their employees in all contexts. *Compare Orsini v. O.S. Seabrooke O.N.*, 247 F.3d 953, 964 (9th Cir. 2001) (ship owner is required to provide legal advice

> regarding the seaman's rights before seaman may sign a release of those rights).

Huseman, 471 F.3d at 1118. The court went on to hold:

> Huseman attempts to bolster his arguments as to equitable tolling and equitable estoppel by arguing that the court should take into consideration his special status as a seaman and a "ward of the court." This argument is unavailing because the "wards of the court" doctrine, while extending special protections to seamen under certain circumstances, does not impose a fiduciary duty on ship owners to serve as legal advisors to their employees, requiring them to provide unsolicited explanation of the availability of federal claims.

Huseman, 471 F.3d at 1124.

Thus, the Ninth Circuit has already rejected Mr. Jones's argument that employers have a duty, under applicable federal maritime law, to serve as legal advisors to their employees and advise them of the availability of federal maritime remedies. It did so under circumstances involving an employer that had processed an employee's worker's compensation claim on the behalf of the employee. Circumstances which are identical to those present in this case. Given that the Ninth Circuit has refused to create the duty Mr. Jones argues for under federal maritime law, it would be improper for this court to create such a duty based on state law.

4. There Exists No Duty To Advise Employees Of Their Legal Remedies Under State Law

Unable to identify any basis under federal law for a duty on the part of an employer to advise an injured employee of their legal rights, Mr. Jones argues that such a duty exists under state law. However, even under state law, Mr. Jones is unable to identify a single case, from any state, much less Washington, identifying or creating such a duty. Rather, Mr. Jones points to several different common law doctrines he claims support the imposition of such a duty.

The first such doctrine identified by Mr. Jones is what is commonly referred to as the volunteer rescue doctrine. In Washington, the volunteer rescue doctrine applies whenever a rescuer fails to exercise reasonable care thereby increasing the risk of harm to those he is trying to rescue, making the rescuer liable for any damages he causes. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 564, 104 P.3d 677 (2004). The rescuer must gratuitously assume the duty to warn endangered parties and then fail to warn them. *Id.*, citing *Smith v. State*, 59 Wn. App. 808, 814, 802 P.2d 133 (1990), *review denied*, 116 Wn.2d 1012 (1991).

In the present case, the State did not gratuitously assume a duty to advise Mr. Jones, or any other employee, what legal remedies may be available to him if he was injured on the job. The State's only "duty" was

to comply with RCW 51.28.025 which requires every employer to ensure that an L&I Accident Report is filed when an employee is injured and receives medical treatment. Because the requirement to file an L&I Accident Report is statutorily mandated, the State did not "gratuitously" assume a duty to advise injured employees of anything, and the volunteer rescue doctrine does not apply.

In addition, because the State never told Mr. Jones it would advise him of his available legal remedies if he was injured on the job, there was no representation from the State for him to rely on. The State Supreme Court has declined to invoke the volunteer rescue doctrine where there was no affirmative act creating the harm, making the situation worse, or inducing reliance. *Folsom v. Burger King*, 135 Wn.2d 658, 677, 958 P.2d 201 (1988). Because there was no gratuitous, or affirmative, acts Mr. Jones could have relied upon, the volunteer rescue doctrine does not apply. *See Burnett*, 124 Wn. App. at 564-65.

Mr. Jones next argues employers have a duty to provide legal advice to injured employees based on the special relationship doctrine. However, once again, Mr. Jones cannot cite a single special relationship case which supports this proposition. This is because special relationship duties arise only in the context of injuries by third parties. As pointed out in the *Youngblood* case cited by Mr. Jones, the general rule is that a person

has no duty to prevent a third party from causing harm to another. *Youngblood v. Schireman*, 53 Wn. App. 95, 99, 765 P.2d 1312 (1988). An exception to this general rule of nonliability arises where a, "special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct." *Id.* at 99-100. In the present case, there is no allegation that Mr. Jones was harmed by a third party and, thus, the special relationship exception has no applicability.

Finally, Mr. Jones contends an employer's duty to provide legal advice to their employees should be founded on the "beneficial" relationship that exists between an employer and employee. Mr. Jones cites no authority for this argument and State's counsel is unaware of any. Thus, the argument should be disregarded as arguments unsupported by authority will not be considered on appeal. *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

Moreover, Mr. Jones's "benefits' argument rests upon the same fallacy which all his other arguments rest on – that the State voluntarily undertook to advise him of his workmen's compensation remedy. The State did not voluntarily do so; it was required by statute to do so, just as is every other employer. Thus, recognizing a duty in this case means that every employer in the state would have a duty to advise an employee as to

any legal remedies available to the employee if the employee is injured on the job. Creation of such a duty is neither practical nor sound policy.

The fact of the matter is that most employers are neither versed in the law or well-equipped to advise employees of their legal rights. Indeed, advising injured employees as to what causes of action they may or may not be able to pursue is a specialty best left to lawyers. Despite his repeated assertions to the contrary, there is no evidence in the record to suggest that any State employee who spoke with Mr. Jones knew Mr. Jones had federal maritime remedies available to him. As Mr. Little indicated, neither he nor the safety officer was familiar with the Jones Act. More to the point, the *Maziar*[5] decision, which Mr. Jones relies on as evidence the State "knew" he had a federal maritime remedy was not decided until 2009, seven years after his injury.

More importantly, creation of such a rule places an employer in an untenable situation. Under Mr. Jones's proposed duty, employers would be obligated to advise employees as to what claims may be brought against the employer and whether or not they are viable. This places the employer in an inherent conflict of interest as it requires the employer to disclose potential claims or defenses that may compromise the employer's defense position based merely on the disclosure. If the employer fails to

[5] *Maziar v. State of Washington*, 151 Wn. App. 850, 216 P.2d 430 (2009).

do so, injured employees will assert the employer violated the duty by failing to make a full and fair disclosure of all potential claims and defenses, thus either tolling the statute of limitations or giving rise to a separate cause of action for breach of the duty to inform.

Presumably, the duty would also include the obligation to inform the employee what claims they may have against third parties. This is an area fraught with even more peril for the lay employer as the employer is now subject to liability for legal malpractice if they fail to advise the employee of a viable claim against a third party and the statute of limitations runs. It is doubtful that any injured employee relies on their employer to tell them what their legal rights are when they are injured on the job, and no employer would reasonably assume such a duty. Legal advice is properly left to lawyers and it would create an endless source of litigation if a duty were created requiring employers to provide legal advice to injured employees. Mr. Jones's invitation to turn employers into lawyers should be rejected.

5. Mr. Jones's Case Is Not Like The *Abbott* Case

Mr. Jones's claim that his case is like *Abbott* because in both cases the employee relied upon the words and actions of the employer not to pursue more than a worker's compensation claim is without merit. In *Abbott*, the plaintiff was specifically told she could not bring federal

maritime claims and that her exclusive remedy was pursuant to the Worker's Compensation law in her Collective Bargaining Agreement, and she relied upon that representation. *Abbott*, 997 P.2d at 995. There was no such representation relied upon by Mr. Jones; he simply assumed that his only remedy was pursuant to Worker's Compensation. Contrary to Mr. Jones's argument, that distinction should affect the outcome just as it did in *Huseman*. *See Huseman*, 471 F.3d at 1123-24.

Finally, Mr. Jones argues that it was irrelevant that he never asked about his federal maritime remedies for three reasons. First, he says that if he asked, the State would not volunteer the information. This assertion is based on a gross misrepresentation of Mr. Little's testimony. Mr. Little did not testify that if asked about maritime claims he, "would not volunteer an answer to that question." He testified that information regarding claims other than worker's compensation claims was not volunteered at the safety meetings, in part because the safety officer was not familiar with Jones Act claims. It stands to reason that the safety officer wouldn't be well versed in other claims such as products claims, intentional torts and third party claims which might be available to an injured party, which is why they also were not discussed.

Second, Mr. Jones argues it doesn't matter because the plaintiff in *Abbott* didn't ask about maritime claims, she was told by the State's adjuster that the Collective Bargaining Agreement provision she relied on was unconstitutional. Of course, the plaintiff in *Abbott* had no reason to ask because her Collective Bargaining Agreement affirmatively told her she had no maritime remedies. Thus, Mr. Jones's second "reason" it is irrelevant that he didn't ask has no merit. The court in *Huseman* certainly felt it was relevant that the plaintiff had not asked about the availability of maritime remedies in the absence of anyone telling him they weren't available. *Huseman*, 471 F.3d at 1120-21.

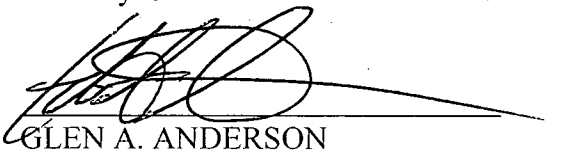
Third, Mr. Jones asserts whether he asked or not is irrelevant because the State took it upon itself to educate him about his remedies. Once again, the State did not take it upon itself to educate Mr. Jones or any other employee about what remedies might be available if they were injured on the job. The State complied with the legal obligation to report an injury to L&I. If that triggers a duty to advise an employee of all their legal rights, it is a duty that applies to all employers in the state and is a duty that substantially increases an employer's obligations under the law and liability exposure.

V. CONCLUSION

The arguments put forward by Mr. Jones have repeatedly and consistently been rejected by the courts addressing them when previously advanced. Indeed, each of Mr. Jones's arguments was rejected by the Ninth Circuit in the *Huseman* case. As his claims are controlled by federal law, and his arguments have been rejected by courts applying federal law, they should similarly be rejected in this appeal and the judgment of the trial court affirmed.

RESPECTFULLY SUBMITTED this 7th day of December, 2012.

ROBERT M. McKENNA
Attorney General



GLEN A. ANDERSON
WSBA #17490
Attorneys for Defendant State
Attorney General's Office
Torts Division
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401-2317
253-593-5243

PROOF OF SERVICE

I certify that I served a copy of the Respondent's Brief on appellant's counsel of record on the date below via e-mail and U.S. Mail, postage pre-paid on December 7th, 2012, and the corrected brief in the same manners on December 10th, 2012, as follows:

Eric Dickman
P.O. Box 66793
Seattle, WA 98166

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of December, 2012, at Tacoma, Washington.

CORIE SKAU, Legal Assistant